

No. 15895✓

United States
Court of Appeals
for the Ninth Circuit

ANTUN KARLO KOCELJ,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration, and HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAR 31 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

LLOYD H. BURKE, ESQ.,
United States Attorney,
Post Office Building,
San Francisco, California,

For Appellees.

JACKSON AND HERTOGS,
JOSEPH S. HERTOGS, ESQ.,
580 Washington Street,
San Francisco, California,

For Appellant.

In the United States District Court in and for the
Northern District of California, Southern Division

No. 35089

ANTUN KARLO KOCELJ,

Plaintiff,

vs.

BRUCE G. BARBER, as District Director, San
Francisco District, Immigration and Naturali-
zation Service, and HERBERT BROWNELL,
JR., as Attorney General of the United States,

Defendants.

PETITION FOR REVIEW

Comes Now the plaintiff, Antun Karlo Kocelj,
complains of the defendants and for cause alleges:

I.

That this complaint is filed and these proceedings
are instituted under Section 10 of the Administra-
tive Procedure Act (60 Stat. 243, 5 U.S.C. 1009)
seeking judicial review of the administrative action
taken in plaintiff's case;

II.

That the plaintiff is an alien, a native of Yugo-
slavia, who last entered the United States at Phila-
delphia, Pennsylvania, on March 8, 1941; that at the
time of his arrival on March 8, 1941, plaintiff was
inspected and admitted to the United States by the
Immigration and Naturalization Service as a sea-

man for a period of sixty (60) days under the provisions of Section 3(5) of the Immigration Act of 1924 (43 Stat. 154; 8 U.S.C. 203), as amended;

III.

That in May, 1941, the plaintiff was arrested by the Immigration and Naturalization Service at El Paso, Texas, as an alien illegally in the United States; that the Immigration and Naturalization Service thereafter ordered the plaintiff deported from the United States on the ground that at the time of his arrival he was an alien immigrant not in possession of a valid immigration visa; that under date of November 23, 1945, the Board of Immigration Appeals directed that the deportation hearing of the plaintiff be reopened; that on or about April 26, 1949, the Board of Immigration Appeals denied plaintiff's application for suspension of deportation; that plaintiff thereafter filed an application for adjustment of status under Section 4 of the Displaced Persons Act of 1948, as amended; that plaintiff's application for adjustment of status under the Displaced Persons Act was denied on October 23, 1952, on the ground that the plaintiff did not lawfully enter the United States; that plaintiff's Motion for Reconsideration was denied on or about August 27, 1953; that on or about August 4, 1954, plaintiff filed an application for adjustment of status under Section 6 of the Refugee Relief Act of 1953; that in the early part of 1955 plaintiff was accorded what allegedly is called a hearing by the San Francisco office of the Immigration and Na-

turalization Service; that during the course of that proceeding, for the first time, counsel was afforded an opportunity to review all of the record relating to the plaintiff herein; that the documents contained in the Immigration and Naturalization Service record clearly establish that the plaintiff was a bona fide seaman who attempted to reship foreign from the United States following his arrival on March 8, 1941; that plaintiff's application for adjustment under the Refugee Relief Act was denied on or about June 16, 1955; that on or about August 23, 1955, plaintiff filed with the Board of Immigration Appeals a Motion to Reopen the Deportation Proceedings for the purpose of considering the evidence found in the Immigration and Naturalization Service records during the so-called Refugee Relief hearing; that under date of October 19, 1955, the Board of Immigration Appeals denied plaintiff's Motion to Reopen.

IV.

That the defendants, and each of them, have wilfully refused to consider relevant facts contained within the official records of the Immigration and Naturalization Service; that the decision is arbitrary, capricious and contrary to the evidence, and that the decision is erroneous as a matter of law.

V.

That the defendants, and each of them, denied plaintiff fair and impartial hearings, which complied with procedural due process of law, on his ap-

plications filed under Section 4 of the Displaced Persons Act, as amended, and Section 6 of the Refugee Relief Act.

VI.

That the plaintiff will suffer a legal wrong and will be adversely affected and aggrieved if the defendant is permitted to deport plaintiff from the United States; that plaintiff has no other adequate remedy at law.

Wherefore, plaintiff prays for a judgment of this Court declaring that the decision is in error; that the Immigration and Naturalization Service failed to grant plaintiff hearings which complied with procedural due process of law, and for such other and further relief as the Court may deem just and proper.

JACKSON & HERTOGS,
Attorneys for Plaintiff;

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed November 30, 1955.

[Title of District Court and Cause.]

ANSWER

Defendant Bruce G. Barber, as District Director, San Francisco District, Immigration and Naturalization Service, answers the complaint herein as follows:

First Defense

1. The Regional Commissioner, Southwest Region, Immigration and Naturalization Service, San Pedro, California, is an indispensable party to a review of decisions refusing adjustment of status under the Displaced Persons Act of 1948, or the Refugee Relief Act of 1953. The named defendant, Bruce G. Barber, District Director, San Francisco District, Immigration and Naturalization Service, who is the only person summoned before this court made no decision as to adjustment of status under either Act. Pursuant to regulations promulgated by the Attorney General, the decision is with the Regional Commissioner. 20 Fed. Reg. 6380 (1955). His office is located in San Pedro, California, in the Southern District of the State of California. This action is brought in the wrong district.

Second Defense

2. This court is without jurisdiction to review decisions denying adjustment of status under the Displaced Persons Act of 1948, or the Refugee Relief Act of 1953. Pursuant to the provisions of the statutes, the decisions are final, and not subject to judicial review.

Third Defense

Admits and avers as follows:

3. Admits the averments of paragraph II of the petition.

4. On March 8, 1941, plaintiff was issued a permit to enter this country as an alien seaman for a period not to exceed 60 days at Philadelphia, Pennsylvania. Plaintiff was arrested on May 22, 1941, in El Paso, Texas, as an alien illegally in the United States not in possession of a valid immigration visa. In a decision filed June 28, 1941, it was ordered that the alien be deported to Yugoslavia, at government expense, or in lieu thereof, that plaintiff be permitted to depart from the United States to any country of his own choice within 60 days. Upon review of this order, on April 9, 1942, the Board of Immigration Appeals ordered that the alien be deported, but that an order of deportation "not be entered at this time, but that the alien be required to depart from the United States, without expense, to any country of his choice within thirty days after notification of decision, on consent of surety." On October 3, 1945, plaintiff moved the Board of Immigration Appeals to reopen his case. The motion was granted on November 1, 1945. By a decision dated January 28, 1946, the order of April 9, 1942, was affirmed. On December 17, 1945, plaintiff applied for departure in lieu of deportation, and pre-examination. By an order dated April 30, 1948, plaintiff's petition for voluntary departure without an order of deportation was granted, and plaintiff's application for pre-examination was denied. Thereafter, in view of the fact that plaintiff had failed to voluntarily depart, in a decision dated July 15, 1947, it was ordered that the privilege of voluntary departure previously granted the alien be

withdrawn, and that the alien be deported to Yugoslavia at government expense on the ground that he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by the acts or regulations. This decision was affirmed by the Board of Immigration Appeals on July 18, 1947, and a warrant of deportation was issued that day. Thereafter, on August 12, 1947, an application was received from the alien's attorney for discretionary relief on the ground that the alien had since married a native-born United States citizen. Thereafter, by order dated January 16, 1948, the Board of Immigration Appeals ordered the outstanding order and warrant of deportation withdrawn and the hearing reopened to permit the alien to apply for suspension of deportation. On July 2, 1948, after a hearing on the matter, it was ordered that suspension of deportation be denied. On December 18, 1947, an interlocutory decree of divorce was awarded against Anton K. Kocelj by his wife on the grounds of extreme cruelty. On April 26, 1949, the Board of Immigration Appeals affirmed the decision denying suspension of deportation. On June 21, 1949, plaintiff moved to reopen the proceedings. This motion was denied by the Board of Immigration Appeals in a written opinion on July 13, 1949. Thereafter plaintiff filed a motion in the Board of Immigration Appeals for an extension of thirty days time within which to depart to any country of his choice after notification of the decision rendered on April 26, 1949. This motion was denied by a written decision of the Board of Immigration

Appeals on July 22, 1949. Plaintiff thereafter applied for relief under the Displaced Persons Act of 1948, as amended, which application was denied on October 23, 1952. On February 20, 1953, plaintiff moved for reconsideration, which motion was denied on August 27, 1953. On August 5, 1954, plaintiff applied for adjustment of immigrant's status under Section 6 of the Refugee Relief Act of 1953. In a hearing before the Regional Commissioner, Southwest Region, Immigration and Naturalization Service, United States Department of Justice, San Pedro, California, the application for adjustment of status was denied on April 22, 1955. Thereafter, on August 23, 1955, plaintiff filed with the Board of Immigration Appeals a motion to reopen the deportation proceedings. In a decision filed October 19, 1955, the Board of Immigration Appeals denied the motion to reopen the deportation proceedings.

5. Defendant denies each and every averment of the petition not heretofore expressly admitted.

Fourth Defense

6. The complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by its petition, that the action of the Board of Immigration Appeals be sustained, and that defendant have judgment for its costs of suit and for such other relief as the court considers proper.

Dated: June 8, 1956.

LLOYD H. BURKE,
United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed June 8, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To Defendants Above Named and to Lloyd H. Burke, United States Attorney and Marvin D. Morgenstein, Assistant United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California, His Attorneys:

Please Take Notice that on Monday, May 6, 1957, at the hour of 10:00 a.m., or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, California, the plaintiff will move the Court to enter summary judgment for the plaintiff, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Dated: April 17, 1957.

/s/ JOSEPH S. HERTOGS,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

NOTICE OF CROSS-MOTION FOR SUMMARY
JUDGMENT BY DEFENDANTS

Please Take Notice That upon the pleadings herein and the record of the proceedings of the Immigration and Naturalization Service, a certified copy of which will be offered as an exhibit, and upon all the proceedings herein, the defendants, by their attorneys, will make a cross-motion before this Court on Monday, May 6, 1957, at the hour of 9:30 a.m., or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, California, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, directing that summary judgment herein be entered in favor of the defendant, and for such other and further relief as the Court may deem just.

Dated: April 29, 1957.

LLOYD H. BURKE,

United States Attorney;

By /s/ JAMES W. GRANT,

Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

ORDER

The Court finds that previous immigration proceedings provided the plaintiff with a fair and impartial hearing. He was in no way deprived of due process of law. There is no evidence to support any arbitrary and capricious decision.

In view of the plethora of authorities in favor of the defendants and against the plaintiff, the cross-motion of the defendants for summary judgment is hereby granted.

It Is So Ordered.

In re Chow's Petition, S.D.N.Y., 1956,
146 F. Supp. 487.

Lukman v. Holland, E.D., Pa. 1956,
149 F. Supp. 312.

Mascarin v. Holland, E.D., Pa., 1956,
143 F. Supp. 427.

Dated: November 14th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed November 14, 1957.

In the United States District Court for the
Northern District of California, Southern Division
Civil No. 35089

ANTUN KARLO KOCELJ,

Plaintiff,

vs.

BRUCE G. BARBER, as District Director, San
Francisco District, Immigration and Naturali-
zation Service, and HERBERT BROWNELL,
JR., as Attorney General of the United States,

Defendants.

SUMMARY JUDGMENT

The motion of the plaintiff for summary judgment and the cross-motion of the defendants for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure having been submitted and the Court, after reviewing the administrative record, having found the plaintiff has been accorded due process of law with a fair and impartial hearing

and that there is no evidence of any arbitrary or capricious decision; and having heretofore on November 14, 1957, made and entered its order granting defendants' motion for summary judgment:

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff is entitled to no relief, and the complaint and action are hereby dismissed and that the defendants have judgment of their costs in the sum of \$20.00.

Dated: November 21st, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed November 21, 1957.

Entered November 22, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 8th day of January, 1958, that Antun Karlo Kocelj hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 22nd day of November, 1957, in favor of the defendants and against the said Antun Karlo Kocelj, plaintiff.

JACKSON & HERTOGS,
Attorneys for Plaintiff;

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed January 14, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the Plaintiff has appealed to the United States Court of Appeals, for the Ninth Circuit from the judgment of this court entered.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, United Pacific Insurance Company, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of breach of any condition hereof, the above-entitled Court, may proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of Section 73C of the Federal Rules of Civil Procedure.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and

attested at San Francisco, California, by its duly authorized officer, this 14th day of January, 1958.

UNITED PACIFIC
INSURANCE COMPANY,

By /s/ M. CULLEN,
Attorney-in-Fact.

[Endorsed]: Filed January 15, 1958.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1955

Nov. 30—Filed complaint—issued 2 summons.

* * *

Mar. 27—Filed notice by deft. of motion to dismiss,
April 9, 1956.

* * *

Apr. 9—Ordered, motion to dismiss denied. (Ham-
lin.)

June 8—Filed answer of Bruce G. Barber.

1957

* * *

Apr. 22—Filed notice and motion by plaintiff for
summary judgment, May 6, 1957.

Apr. 29—Filed notice and motion by defendants of
cross-motion for summary judgment, May
6, 1957.

1957

May 6—Ordered after hearing, memos, to be filed 20-10-5 days and motions for summary judgment and case cont'd. to June 10, 1957, for submission. (Murphy.)

June 10—Ordered case continued to June 25, 1957, for submission. (Murphy.)

* * *

Sept. 9—Ordered after hearing, counsel for defendant's motion to submit matter on administrative record denied. Memos. ordered filed 10-5 days and case continued to September 26, 1957, for submission. (Murphy.)

* * *

Sept. 25—Ordered case continued to Sept. 27, 1957, for submission. (Murphy.)

Sept. 27—Ordered after hearing, plaintiff to Oct. 4, 1957, to reply to reply brief of defendant and matter to be submitted at later date. (Murphy.)

* * *

Nov. 12—Ordered case submitted. (Murphy.)

Nov. 14—Filed order, cross-motion of defendants for summary judgment granted. (Murphy.)

Nov. 14—Mailed copies order to counsel.

Nov. 22—Entered summary judgment—filed Nov. 21, 1957—that plaintiff is entitled to no relief and defendants to recover costs in sum \$20.00. (Murphy.)

Nov. 22—Mailed notices.

1958

Jan. 14—Filed notice of appeal by plaintiff.

Jan. 14—Filed appellant's designation of record on appeal.

Jan. 15—Mailed notices.

Jan. 15—Filed appeal bond in sum of \$250.00.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from docket entries.

Complaint. (Petition for Review.)

Answer.

Motion of Plaintiff for Summary Judgment.

Motion of Defendant for Summary Judgment.

Order Granting Motion of Defendant for Summary Judgment.

Summary Judgment.

Notice of Appeal.

Appeal Bond. (Photostat copy.)

Appellant's Designation of Record on Appeal.

Defendants' Exhibit "A." (Certified record of Immigration and Naturalization Service.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of February, 1958.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15895. United States Court of Appeals for the Ninth Circuit. Antun Karlo Kocelj, Appellant vs. Bruce G. Barber, District Director, Immigration, and Herbert Brownell, Jr., as Attorney General of the United States, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 18, 1958.

Docketed: February 20, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15895

ANTUN KARLO KOCELJ,

Appellant,

vs.

BRUCE G. BARBER, as District Director, San
Francisco District, Immigration and Naturali-
zation Service, and HERBERT BROWNELL,
JR., as Attorney General of the United States,

Appellees.

POINTS ON APPEAL

Comes Now the appellant, Antun Karlo Kocelj,
by and through his attorney, Joseph S. Hertogs, and
files herein the Points on Appeal on which appellant
intends to rely in the appeal of the above-entitled
matter:

I.

That the District Court erred in concluding that
the decision of the Immigration and Naturalization
Service is based upon reasonable, substantial and
probative evidence.

II.

That the District Court erred in concluding that
the appellant had been given a fair and impartial
administrative hearing.

III.

That the District Court erred in concluding that
the appellant was accorded due process of law under

the Fifth Amendment to the Constitution of the United States.

IV.

That the District Court erred in concluding that all of the circumstances disclosed in the record did not warrant judicial intervention.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed March 18, 1958.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between counsel for the appellant and counsel for appellees that all exhibits introduced at the time of trial of the above-entitled matter may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ CHARLES ELMER COLLETT,
Asst. United States Attorney,
Attorneys for Appellees.

[Endorsed]: Filed March 18, 1958.